

1 ANN BIRMINGHAM SCHEEL
2 Acting United States Attorney
3 District of Arizona
4 J. COLE HERNANDEZ
5 Assistant U.S. Attorney
6 Arizona State Bar No. 018802
7 405 W. Congress Street, Suite 4800
8 Tucson, Arizona 85701-5040
9 Telephone: (520) 620-7300
10 Fax: (520) 620-7138
11 cole.hernandez@usdoj.gov
12 Attorneys for Defendant

13
14
15 **UNITED STATES DISTRICT COURT**
16 **DISTRICT OF ARIZONA**

17 William Leonard Pickard,
18 Plaintiff,
19 v.
20 Department of Justice,
21 Defendant.

22 CV 11-443-TUC-DCB

23 **RESPONSE TO PLAINTIFF'S
24 MOTION FOR ORDER**

25 Comes now Defendant, by and through undersigned counsel, and files this response to
26 Plaintiff's motion for order establishing that the parties may meet and confer by letter or
27 telephone, rather than in person. This response is supported by the accompanying
28 Memorandum of Points and Authorities and all matters of record.

29 **MEMORANDUM OF POINTS AND AUTHORITIES**

30 On February 22, 2012, Plaintiff filed a motion for order establishing that the parties may
31 meet and confer by letter or telephone, rather than in person. (CR 65.) Although undersigned
32 counsel is not exactly sure what relief Plaintiff is requesting, counsel will attempt to respond
33 to the issues as he understands them.

34 Plaintiff argues that the parties are exempt from initial disclosures, but not discovery.
35 Defendant agrees that this case is exempt from initial disclosure pursuant to Fed. R Civ. P.
36 26(a)(1)(B)(iv). Because the Court has already set a discovery deadline of June 29, 2012,
37 (CR 62), it is clear the parties are able to conduct relevant discovery pursuant to Fed. R. Civ.
38 P. 26(b)(1).

1 Plaintiff argues that there is no limitation on when discovery may commence. He
 2 contends that in a prisoner case, there is “no prohibition on the immediate availability of
 3 discovery upon commencement of the case.” Fed. R. Civ. P. 26(d)(1) provides that “a party
 4 may not seek discovery prior to the Rule 26(f) planning conference, except in a proceeding
 5 exempt from initial disclosure under Rule 26(a)(1)(B), or when authorized by . . . a court
 6 order. In this case, a Scheduling Order was issued on January 3, 2012, which set deadlines
 7 for lay and expert witness disclosure and discovery. (CR 62.) Therefore, discovery was
 8 appropriate as soon as the Scheduling Order was issued. Contrary to Plaintiff’s contention,
 9 Rule 26(d)(1) does not provide for the immediate availability of discovery upon the
 10 commencement of a lawsuit and prior to the defendant having answered. *See Stephen v.*
 11 *Kelso*, 2012 WL 371604 (E.D. Cal. February 3, 2012) (While parties to a prisoner action are
 12 exempt from the initial disclosure requirements of Fed. R. Civ. P. 26 and are free to agree
 13 to conduct discovery prior to the issuance of a discovery order, it is the practice of the court
 14 to refrain from compelling compliance with discovery requests before all defendants have
 15 answered and the court has issued a scheduling order.)

16 Plaintiff next argues that the parties remain subject to the meet and confer requirement
 17 of Fed. R. Civ. P. 37(a)(1). Defendant agrees that should a discovery dispute arise, the
 18 parties must confer prior to filing a motion pursuant to Rule 37. However, in this case, there
 19 is no basis for a motion to compel because there has been no discovery served by Plaintiff.
 20

1/

21 Finally, Plaintiff argues that his August 18, 2011, letter was a good faith attempt to meet
 22 and confer and obtain stipulations regarding the adequacy of the search. Plaintiff requests
 23 that the Court issue an order permitting the parties to confer by telephone or letter regarding
 24 discovery and that the “order be retroactive to include the letter of August 18, 2011. . .”
 25 Defendant is not exactly sure what Plaintiff is requesting, but to the extent Plaintiff is
 26

27 ^{1/} Plaintiff’s letter of August 18, 2011, did not constitute written discovery pursuant
 28 to the Federal Rules. Additionally, Defendant had not even answered Plaintiff’s Second
 Amended Complaint by that date.

1 requesting that he be able to conduct relevant discovery, Defendant has no objection. To the
2 extent Plaintiff is requesting that this Court somehow consider his letter of August 18, 2011,
3 as a discovery request, Defendant objects to such a request. Plaintiff's letter is nothing more
4 than a demand for information and an assertion by Plaintiff that the agency's search was
5 inadequate. It does not constitute a formal discovery request pursuant to the Federal Rules
6 of Civil Procedure and should not be considered as such. Pro se parties are required to
7 follow the same rules of procedure that govern other litigants. *See King v. Atiyeh*, 814 F.2d
8 565, 567 (9th Cir. 1987).

9

10 Respectfully submitted this 8th day of March, 2012.

11

12 ANN BIRMINGHAM SCHEEL
13 Acting United States Attorney
14 District of Arizona

15

16 s/ J. Cole Hernandez
17 J. COLE HERNANDEZ
18 Assistant U.S. Attorney

19

20 Copy of the foregoing served electronically or by
21 other means this 8th day of March, 2012, to:

22

23 William Leonard Pickard
24 # 82687-011
25 U.S. Penitentiary - Tucson
26 P.O. Box 24550
27 Tucson, AZ 85734
28 Plaintiff Pro Se

29 s/ Pamela Vavra

30

31

32

33

34

35

36

37

38